Supreme Court, U.S.
FILED
MAR 31 2003
CLERK

No. 02-925

IN THE

Supreme Court of the United States

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, BELLUR PRABHAKAR, Ph.D., GERALD MOSS, M.D., ELIZABETH HOFFMAN, Ph.D., DAVID C. BROSKI and JAMES J. STUKEL, Ph.D.,

Petitioners,

v.

NAVREET NANDA and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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I. THE CIRCUIT COURTS OF APPEAL LACK CLARITY AS TO THE STANDARDS TO APPLY WHEN ADJUDICATING THE LEGITIMACY OF SECTION 5 CONGRESSIONAL ENACTMENTS THAT ABROGATE SOVEREIGN IMMUNITY, ESPECIALLY IN RESPECT TO GENDER BASED CLASSIFICATIONS.

It is not useful or rational to assert, as the Government[1] and Respondent do in their briefs in opposition, that there is no dichotomy or confusion among the circuit courts of appeal as to the standards to be applied when adjudicating the legitimacy of Section 5 Congressional enactments that abrogate the States' sovereign immunity merely because two different congressional enactments are under scrutiny. (U.S. Br. pp.4-5; Resp. Br. p.13).[2] Reason dictates that the same constitutional standards embodied in the Court's Section 5 and Eleventh Amendment jurisprudence be applied equally whether the Congressional act under scrutiny is the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601 *et seq.* or, as here, the 1972 Amendments to the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* Nor is it useful or rational to assert that the circuit courts of appeal are not divided as to the exact nature of the findings and the quantum and quality of the evidence that Congress must demonstrate in its legislative record to constitutionally exercise its Section 5 power in abrogating the States' sovereign immunity.

For example, the Ninth Circuit in *Hibbs v. HDM Dep't of Human Resources*, 273 F.3d 844, 858 (9th Cir. 2001), upheld

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1. "Government" refers to the United States Department of Justice, Office of the Solicitor General.

2. "U.S. Br." refers to the Brief for the United States In Opposition filed by the Solicitor General. "Resp. Br." refers to the Brief In Opposition for Respondent Navreet Nanda, Ph.D. filed by the Respondent.

the FMLA as a legitimate exercise of Section 5 power placing very little, if any, weight on evidence in the Congressional Record as to the States' behavior as to the targeted unconstitutional conduct. The Fifth Circuit in *Kazmier v. Widmann*, 225 F.3d 519, 524 (5th Cir. 2000), held the exact opposite, stating that such evidence was absolutely essential and wholly lacking. Moreover, in *Nanda v. Board of Trustees of the Univ. of Illinois, et al.*, 303 F.3d 817, 827-828 (7th Cir. 2002), the Seventh Circuit as it did in *Varner v. Illinois State Univ.*, 226 F.3d 927, 935 (7th Cir. 2000) and *Cherry v. University of Wis. Sys. Bd. of Regents*, 265 F.3d 541, 549 (7th Cir. 2001), held that explicit legislative findings are not a necessary element of a Section 5 inquiry, and, in any event, not dispositive. In *Chittister v. Department of Community & Econ. Dev.*, 226 F.3d 223, 229 (3d Cir. 2000), *Lizzie v. Alexander*, 255 F.3d 128, 135 (4th Cir. 2001) and *Laro v. New Hampshire*, 259 F.3d 1, 13 (1st Cir. 2001), however, the Third, Fourth and First Circuits, respectively, clearly required explicit legislative findings of a widespread pattern of the targeted unconstitutional conduct by States as being essential to a Section 5 inquiry and predicate to the legitimacy of the enactment. Further, while a person reading *Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368-374 (2001), is compelled to conclude from the extended arguments between the members of the Court, and indeed from the express emphatic language of the majority and concurring opinions, that explicit legislative findings of a widespread pattern of the targeted unconstitutional behavior by States is both essential and *predicate* to a legitimate Section 5 enactment, the courts of appeal are plainly not persuaded as to such requirements. The Seventh Circuit here, in *Nanda*, is plainly not so persuaded. The divisions and confusion as to these proper standards in respect to a Section 5 inquiry will remain to the prejudice and detriment of the sovereign States, absent further clarifying expressions by the Court.

Confusion and division also remain among the circuit courts in respect to the meaning and scope of the Court's opinion in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 n.11 (1976), vis-a-vis the legitimacy of Congress' exercise of its Section 5 power when enacting the 1972 Amendments to Title VII. For example, the Eighth Circuit in *Okruhlik v. University of Arkansas*, 255 F.3d 615, 622 (8th Cir. 2001), wholly relied upon *Fitzpatrick* in upholding the Title VII Amendments as a legitimate Section 5 enactment, but the same court in a subsequent opinion in *Maitland v. University of Minnesota*, 260 F.3d 959, 964 (8th Cir. 2001), rejected *Fitzpatrick* as precedent for that proposition. Moreover, the Seventh Circuit also rejected *Fitzpatrick* as precedent to the issue before it here in *Nanda*, 303 F.3d at 822. Nevertheless, the Government and Respondent insist in their briefs in opposition that *Fitzpatrick* was and is dispositive. The Court should also put this confusion and division among the circuits to rest.

Finally, the issues presented in this petition are substantial constitutional issues, the resolutions of which are vital to the States thereby in any event requiring no showing of a split among the circuit courts of appeal. *See, e.g., Livadas v. Bradshaw*, 512 U.S. 107, 116 (1994); *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 66 (1986); *Jefferson County Pharm. Ass'n, Inc. v. Abbott Lab.*, 460 U.S. 150, 153 (1983); *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 402 (1981); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 14 (1979) (in each case, granting certiorari to resolve important questions of federal law absent a split of authority).

II. ELEVENTH AMENDMENT JURISPRUDENCE PROHIBITS CONGRESS FROM ENACTING LEGISLATION, INCLUDING LEGISLATION IN RESPECT TO RACE, GENDER AND NATIONAL ORIGIN CLASSIFICATIONS, THAT ATTEMPTS TO SUBJECT SOVEREIGN STATES TO FEDERAL JURISDICTION, UNLESS IT FIRST REBUTS IN ITS LEGISLATIVE RECORD THE PRESUMPTION THAT THE STATES ARE AT ALL TIMES ACTING CONSTITUTIONALLY IN RESPECT TO RACE, GENDER AND PERSONS OF DIVERSE NATIONAL ORIGIN.

The Government and Respondent assert in their briefs in opposition that the States, like private citizens, may be subjected automatically to federal jurisdiction by congressional fiat whenever race, gender or national origin classifications are implicated. (U.S. Br. p.6; Resp. Br. p.20). They further argue that when such classifications are implicated, the States are not presumed to act constitutionally, but rather must rebut the presumption that they acted in violation of the Constitution. *Id.*

These assertions and contentions make no sense in that they beg the very issue of immunity. Equal sovereign States are not private citizens. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 634 (1999); *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 122 S. Ct. 1864, 1874 (2002). Congress is prohibited by this Court's jurisprudence from treating sovereign States as if they were. *Id.* Unlike the imposition of federal jurisdiction by Congressional fiat over private citizens who enjoy no presumption of acting at all times in a constitutional manner, Congress may not attempt to impose its jurisdiction over sovereign States without first complying with this Court's

strictures. *Garrett*, 531 U.S. at 368-374. Eleventh Amendment jurisprudence repeatedly has instructed Congress that the States are equal sovereign entities that are presumed at all times to act constitutionally and that *before* it attempts through the exercise of its Section 5 power to assert jurisdiction over those entities, it must rebut that presumption with solid reliable evidence to the contrary in its legislative record. *Florida Prepaid*, 527 U.S. at 640-647; *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 89-91 (2000); *Garrett*, 531 U.S. at 368-374. The cases cited by the Government and Respondent in their briefs in opposition do not warrant a different conclusion. In those cases, it was merely assumed by the Courts that the State litigants were not immune as a result of their sovereignty. In other words, none of the cited cases addressed the paramount issue raised here; namely, whether States in the first instance were properly made subject to the federal jurisdiction of Title VII. The arguments of the Government and Respondent, therefore, are without reason and contrary to this Court's established jurisprudence.

III. THE ASSERTION THAT THE NATION'S LONG HISTORY OF DISCRIMINATION AS DOCUMENTED IN THIS COURT'S DECISIONS SUFFICES FOR CONGRESS' ATTEMPTED ABROGATION OF THE STATES' SOVEREIGN IMMUNITY BY THE ENACTMENT OF THE 1972 AMENDMENTS TO TITLE VII IS SPECIOUS.

The Government and Respondent assert in their briefs in opposition that the nation's long history of discrimination as documented in the decisions of this Court can be readily substituted for the non-existent Title VII legislative record both to support the conclusion that the States engaged in such discrimination practices and to support abrogation. (U.S. Br. p.6; Resp. Br. p.29). This argument is specious. *First*, in 1972

when the Title VII Amendments were enacted, there was absolutely no history of discriminatory activities by States documented in this Court's decisions for Congress to consider. *Second*, in 1964 when the Civil Rights Act was initially enacted, including Title VII, the States were expressly excluded from coverage precisely because of their Eleventh Amendment rights. Whatever occurred between 1964 and 1972 to cause Congress to reverse its relationship with the States and attempt abrogation, it was certainly not decisions of this Court purportedly documenting the States' bad acts during that eight-year time period. *Lastly*, had Congress relied in 1972 on this Court's decisions as support for its attempted abrogation of the States' sovereign immunity, it could easily have stated so in the legislative record. *Garrett*, 531 U.S. at 371. The fact that it did not do so establishes that the reliance argument proffered by the Government and Respondent is of no merit.

CONCLUSION

For all of the reasons stated in its Petition for a Writ of Certiorari as well as reasons set forth above, the Petitioner, The Board of Trustees of the University of Illinois, respectfully petitions the Court to grant its Petition for a Writ of Certiorari.

Respectfully submitted,

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